UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMMODORE WILLIAM MOSS,
Appellant,

vs.

LAWRENCE E. WILSON,
Appellee.

No. 22198

APPELLEE'S BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code, section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE AND FACTS

Appellant's application for a writ of habeas corpus was first filed in the federal District Court on October 11, 1966 (CT 5). The District Court issued an order to show cause on this same date (CT 33). Appellee's return to the order to show cause was filed on November 25, 1966 (CT 158). A copy of the clerk's transcript of the state municipal court proceedings concerning appellant was

attached to the return and the reporter's transcripts of both municipal and superior court proceedings were lodged with the Clerk of the District Court (CT 160, 162, 168).

Thereafter, on April 12, 1967, the District Court entered an order appointing counsel to represent appellant (CT 217). An evidentiary hearing was held on May 19, 1967. The issues considered at the hearing were whether appellant's plea of guilty was knowingly and understandingly entered with some understanding of the consequences and whether he had effective assistance of counsel (RT 24).[1]

By way of background it is to be noted that appellant was initially charged in this matter with violating California Penal Code section 217 (assault with intent to commit murder) and sections 187/664 (attempted murder). He was first arraigned on the charges in the municipal court on July 3, 1964 (CT 168). On that same date appellant requested that the court appoint counsel to represent him and on July 6, 1964, Gerald Ragan accepted the appointment (CT 168).

Appellant next appeared in the municipal court, with counsel, on July 7, 1964 (CT 168). The court at that time stated that it had previously explained each of the charges to appellant. Counsel waived formal reading of the complaint and any advice as to rights, and appellant plead

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1. "RT" refers to the Reporter's Transcript of the hearing held in the United States District Court.

not guilty to each of the charges (RTM 2).[2] Counsel stated that he had explained the purpose of a preliminary to appellant and it was the desire of both he and appellant to waive such a hearing (RTM 2-3). The court fully questioned appellant personally as to his understanding of the nature of the proceeding (RTM 3). The court accepted appellant's offer to waive the preliminary examination and ordered that he be held to answer in the superior court (RTM 3-4).

Appellant next appeared, with counsel, in the superior court on July 15, 1964 (RTS 2).[3] At that time counsel waived reading of the information and any advice as to rights and asked for a ten-day continuance and order to further investigate the matter (RTS 2). He also requested permission of the court to spend up to $100 on appellant's behalf for a psychiatric evaluation (RTS 2-3).

Appellant next appeared, with counsel, on July 24, 1964 (RTS 4). At that time counsel indicated that appellant had been examined by a Dr. Anderson and in the doctor's opinion there was no legal medical defense to the charges (RTS 4-5). Appellant then pled guilty to a violation of Penal Code section 245 (assault with a deadly weapon), a

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[2] "RTM" refers to the Reporter's Transcript of the municipal court proceedings.

[3] "RTS" refers to the Reporter's Transcript of the superior court proceedings.

lesser offense included within the offense charged in Count I of the information (RTS 5). Count II of the information, charging attempted murder, was dismissed (RTS 5). Appellant was sentenced to state prison on August 7, 1964 (RTS 7-8).

Both appellant and his former counsel testified at the hearing held by the federal District Court. Appellant testified, in essence, that counsel spent little, if any, time with him, explained very little and that he pled guilty only because counsel told him to (RT 18-19). More specifically, he testified that when he first appeared in the municipal court the complaint was read to him, he was advised of his right to counsel and requested that counsel be appointed to represent him (RT 11-13). He stated that he next appeared on July 7, 1964, and that appointed counsel was there with him (RT 13). However, he stated that he had not seen counsel before going to court on that date and that he had not seen him the day before (RT 13).

He stated that he pled not guilty at this appearance (RT 15). Further, the only matter he might have discussed with counsel prior to that appearance was bail (RT 15). He stated that counsel did not explain to him the purpose of a hearing to be held at the time (RT 16). Furthermore, he stated that his recollection of what occurred was independent from any transcript of the proceedings (RT 15).

Appellant testified he next appeared in superior court on July 15, 1964 (RT 16). He stated that he had not talked to counsel prior to this court appearance (RT 16).

Appellant's next appearance was on July 24, 1964 (RT 18). He indicated that the only time he saw his counsel between the two appearances was for a brief moment in the corridor on the way to the courtroom on the 24th (RT 18). According to appellant the only thing said was by counsel who stated that he did not have time for jury trial (RT 18).

Appellant pled guilty during his appearance on July 24th. At the District Court hearing he testified that he had previously pled guilty because he was told to do so, at the time, by his counsel (RT 19). Further, he stated that he had not discussed his plea with Mr. Ragan at any time before that, that he did not understand the nature of the offense to which he was pleading guilty, that it was a lesser offense than those originally charged nor that it was a felony (RT 19-20).

Appellant next appeared on August 7, 1964, for sentencing (RT 20). Again, he testified that he had not at any time discussed the matter with counsel prior to the appearance (RT 20-23).

Gerald Ragan testified that he was appointed to represent the appellant some time between July 3 and July 6, 1964 (RT 51). He first met with appellant in the county jail on the latter date (RT 51). He had previously taken one page of background notes from the person who notified him of the appointment (RT 53).

The meeting itself lasted between one and one-half and two hours, during which time counsel took two and one-half

pages of detailed notes (RT 53). These notes detailed the appellant's background, including family problems and his version of the incident (RT 54). The notes included only matters related by appellant and did not reflect any advice given him by counsel (RT 55). Mr. Ragan testified that based on his notes and other matters it was his judgment that appellant was quite lucid at the time and understood what was going on (RT 57).

Counsel also testified that, although he had no notes on the matter, he undoubtedly explained in detail the future court proceedings and possibilities. This would include the nature of the charges, the nature of the court proceedings and the possibilities open to appellant in the superior court (RT 55-57).

Mr. Ragan also investigated other aspects of the case. This included an interview with the investigating officer from the Pacifica Police Department and the determination of what the prosecution's case looked like, including what prosecution witnesses' testimony would be (RT 60). He also received phone calls about the case from a Bishop John Cunningham of the Mormon Church and had a psychiatric evaluation made of appellant (RT 60-61, 63). After this he contacted the District Attorney's office regarding a plea to a lesser offense (RT 64-65).

Finally, Mr. Ragan testified that he knows he would not have advised the appellant to plead guilty in court immediately prior to such a plea being entered (RT 65). He

testified that he was sure he would have discussed the matter with appellant first, although he is not certain where such a discussion took place (RT 65, 67). He was certain in his own mind that appellant agreed with the plea at the time (RT 65-66). He was positive that he did not tell appellant he would get probation and that in all probability, he was going to prison (RT 66).

Following the evidentiary hearing the District Court entered its order denying the petition for a writ of habeas corpus (CT 225). In the course of its opinion the court stated:

> "In his application to this Court for a writ of habeas corpus . . . [petitioner] has submitted numerous documents and attempted to raise many issues, only one of which is sufficient to merit consideration in this order. This is his allegation that his plea of guilty to a lesser included offense in one of the offenses initially charged was involuntary and made without the effective aid of counsel. (Footnote omitted)." (CT 225-226).

The court further stated:

> "The evidence adduced at the evidentiary hearing produced an irreconcilable conflict between the views of petitioner and those of Gerald Ragan, Esq., who was petitioner's appointed counsel at his trial in the state courts."
> (CT 226).

And, finally:

> "The Court concludes, on the basis of the entire record and the testimony taken at the evidentiary hearing, that counsel's version of the facts is more believable and better supported by the record and the evidence introduced at the hearing. It further finds that petitioner was properly represented by counsel and that he pleaded guilty with an understanding of the significance of the plea and the consequences steming therefrom. See Knowles v. Gladden, ______F.2d _____(9th Cir. No. 21,216, decided May 3, 1967). In light of the seriousness of the charges against petitioner and the strength of the evidence, a plea of guilty to a lesser included offense on one count was a very reasonable course to pursue." (CT 228).

Appellant's notice of appeal was filed on September 6, 1967 (CT 294).

APPELLANT'S CONTENTIONS

Appellant's plea of guilty in the trial court was uninformed and involuntary and must be set aside.

A. Appellant was deprived of fundamental due process of law in that at no time was he given any real notice of the true nature of the charge to which his plea of guilty was entered.

B. Appellant was deprived of effective aid of counsel in determining his plea.

C. Appellant was deprived of fundamental due process of law in that the trial court judge failed to determine if appellant's plea of guilty was entered voluntarily, with an adequate understanding of the nature of the charge to which he pled guilty, with an adequate understanding of the possible penalties attended therewith and whether, in fact, appellant was actually guilty of a violation.

D. Appellant was deprived of the effective aid of counsel at all stages of the proceedings in the state courts.

APPELLEE'S ARGUMENT

APPELLANT KNOWINGLY AND UNDERSTANDINGLY ENTERED A PLEA OF GUILTY UPON THE ADVISE OF COMPETENT COUNSEL WHO AFFORDED HIM EFFECTIVE REPRESENTATION.

Although appellant's brief presents several assignments of error, they all relate to the one issue presented to and decided by the District Court. That is, whether ". . . his plea of guilty to a lesser included offense . . . was involuntary and made without the effective aid of counsel." (CT 225-226). The District Court properly concluded that appellant's plea was entered voluntarily and with the effective assistance of competent counsel.

As stated in Williams v. Beto, 354 F.2d 698 (5th Cir. 1965), at 704:

> "It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. (Citing cases)."

It is settled, of course, that a habeas corpus petitioner has the burden of proving his allegation that he was inadequately represented during his criminal trial. Williams v. Beto, supra, at 704; Wilson v. Rose, 366 F.2d 611, 617 (9th Cir. 1966). Furthermore, it is submitted that the posture of this case now is essentially the same as was Knowles v. Gladden, 378 F.2d 76 (9th Cir. 1967), when this Court stated, at pages 766-767:

> ". . . the district court found specifically that appellant's guilty plea was made voluntarily and with full understanding of the consequences. We cannot set aside this finding unless it is clearly erroneous. F.R. Civ.P. 52(a). On this record there is substantial evidence that appellant entered the plea voluntarily. He did so only after consultation with, and upon the advice of, competent counsel. (Footnote omitted).

In support of his contentions here it is argued, first of all, ". . . that appellant was not at any time informed of the nature of the charge to which he pled guilty -- California Penal Code section 245, assault with a deadly weapon" (AOB 15:7-9). The reasons advanced to explain why appellant did in fact plead guilty include: (1) a deferential and timid attitude toward the courts because of his long experience with the summary procedures employed by the courts in drunk charges; (2) his lack of contact with and advice from counsel, and (3) a previous family disturbance which resulted in appellant's pleading guilty to a charge of assault and battery that led to only a six-months term in an honor camp (AOB 16).

All such arguments fail, of course, where a District Court has found that a petitioner was effectively represented by counsel and knowingly entered a plea upon the advice of counsel -- and such a finding is supported by the record. See Knowles v. Gladden, supra. It is submitted that the record here clearly supports the District Court's findings.

In the first place, appellant's trial counsel testified that he met with appellant for approximately one and one-half to two hours on July 6, 1964 (RT 51-52). He at that time took detailed notes of the information given him by the appellant. These notes were before the District Court judge (RT 53-54). Furthermore, counsel testified that although he had no notes on nor independent recollection of what he told appellant at this time, his standard practice was to always

detail to a client what the future court proceedings would be (RT 55). This would include an explanation of the charged offense and the possible ways of resolving the case in the superior court -- including pleading guilty if he was in fact guilty or negotiating a plea with the district attorney (RT 56-57).

Counsel also testified that he had no independent recollection nor notes from his other meetings with the appellant. He indicates that one logical place for him to have met with appellant was while the latter was held in the jury box prior to court proceedings (RT 63). This would have allowed them five to ten minutes to confer (RT 63). He also stated that he would assume that he would have again met with appellant in the jail, although he had no independent recollection of doing so (RT 63).

However, counsel stated emphatically that he would not have told the appellant to plead guilty without discussing the matter with him (RT 65). Furthermore, he would never have any person plead guilty if that person did not wish to do so and, finally, he was satisfied appellant knew he was going to be convicted of a felony (RT 65-66).

As indicated, appellee submits there is more than sufficient evidence to support the District Court's findings. See Shuman v. Peyton, 361 F.2d 646 (4th Cir. 1966).

Appellant, of course, attacks the determination made by the District Court. This is done primarily by characterizing the testimony presented at the hearing in a somewhat

different light than it must have been viewed by the court itself. For example, it is argued that, ". . . appellant's appointed counsel testified that he met with appellant only once in private during the entire course of the proceedings in the state courts. (D.C. Trans. p. 63)" (AOB 17:19-22). What counsel did in fact say was that he had no independent recollection of going back to the jail to visit appellant. Further, he stated he assumed he would have, but had no such recollection (RT 63). Appellant's argument is repeated, in essence, on page 19, lines 6 thru 9.

Such an argument does not, of course, take into account appointed counsel's testimony concerning his standard practice and procedure. The District Court, on the other hand, took such testimony plus other evidence, weighed it against appellant's own testimony and quite properly found against the latter.

Appellant next argues, in essence, that he was denied due process because the state trial judge did not totally comply with the requirements of Federal Rule of Criminal Procedure 11 in accepting his plea. There are, of course, several answers to this argument.

In the first place, these rules are specifically rules of procedure to be followed by the federal courts. F.R. Crim.P. 1. Furthermore, these rules, " . . . are not constitutional requirements but are procedural merestones established, first by statute and then by the Rules, and effectuated by the Supreme Court in its supervision of

criminal proceedings, in the federal courts." United States v. Schwartz, 372 F.2d 678, 682 (4th Cir. 1967).

Finally, it is to be noted that the federal district judge was well aware of the limited examination of appellant by the state court at the time his plea was entered (RT 87). However, the District Court, after considering all the evidence, quite properly determined that appellant's plea was entered knowingly and with an understanding of the consequences (CT 228).

Appellant's final argument again relates to the assistance rendered by trial counsel. Aside from the contention concerning the amount of time spent by counsel with appellant, he argues that counsel failed to interview the victim or any of the witnesses; that he failed to investigate the case including an investigation of appellant's "possible hypersensitivity to alcohol;" that he failed to make an adequate investigation of a possible insanity defense because he did not have an independent psychiatric evaluation made but relied on an opinion received over the telphone from the "prosecution's county psychiatrist," and finally, that counsel failed to prepare for a "penalty hearing" other than to receive a phone call from the probation officer. Appellee submits that these arguments are entirely devoid of merit.

The record discloses that the only defenses put forward by appellant during the initial interview was a possible blackout theory (RT 54). Furthermore, counsel was well aware of appellant's alcoholic history (RT 73). The blackout theory plus the

[illegible]

[illegible]

[illegible]

[illegible]

alcoholism quite obviously led to counsel's having a psychiatric evaluation made of the appellant. There is no evidence whatsoever in the record to show whether the psychiatrist was the "prosecution's" psychiatrist or the defense's psychiatrist. The point is, of course, that such an evaluation was made.

Furthermore, the record discloses that counsel investigated the facts of the case. He interviewed the investigating officer, found out what was on the police report and what the prosecution case looked like (RT 60). He also determined what the prosecution witnesses would testify to including the fact that their children witnessed the appellant kicking the victim, his wife, and stomping her on the face at the time of the incident (RT 60, 81). Based on his investigation counsel decided to, and did, negotiate a plea to a lesser included offense. Finally, the record discloses that counsel not only talked to the probation officer prior to sentencing, he also received two letters from the appellant during this period -- one of which related to appellant's pre-sentence interviews with the probation officer. These letters were introduced as evidence during the District Court hearing (RT 84-85).

It is submitted that from all the above it is quite clear that appointed counsel's representation well surpassed the standards required by the Constitution. Furthermore, it is submitted that the California Court of Appeal's observation in <u>People</u> v. <u>Ferguson</u>, 255 A.C.A. 589 (1967), might be applicable here. The court there stated at page 592:

> "It will not serve the profession of law well, in the long run, for appointed or other counsel to assert that previous counsel was incompetent or unfair in an effort to have a proper convicted felon released. This is not to say that when 'counsel's lack of diligence or competence reduced the trial of a "farce or a sham" [Citation omitted] that nothing should be done or said about it. The facts of this case are such that trial counsel did very well considering what he had to work with."

CONCLUSION

For the foregoing reasons, appellee respectfully submits that the District Court's order dismissing the petition should be affirmed.

DATED: October 23, 1968

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